

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CIVIL ACTION
	:	NO. 95-0159
v.	:	CRIMINAL NO.
	:	92-540-03
JUAN FIGUEROA	:	

M E M O R A N D U M

BUCKWALTER, J.

February 5, 1998

Presently before the court is Defendant's pro se motion to correct his presentence report nunc pro tunc (Docket No. 479); Defendant's pro se motion to correct illegal sentence (Docket No. 480); the government's combined answer (Docket No. 484); Defendant's objections to the government's answer (Docket No. 490); and Defendant's objections to Magistrate Judge M. Faith Angell's ("Magistrate Angell") report recommending denial of Defendant's previously filed petition for habeas relief (Docket Nos. 450, 455 and 489). Based on the following, Defendant's motions are denied and Magistrate Angell's recommendation is approved and adopted.

In March 1993 Defendant, Juan Figueroa ("Figueroa") was found guilty of conspiracy to distribute heroin and was sentenced to 175 months imprisonment and five years of supervised release. Presently, Figueroa attacks the propriety of his sentence through three separate motions; a motion to correct illegal sentence; a

motion to correct his presentence report and a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. The merits of each are discussed below.

#### **I. Motion to Correct Presentence Investigation Report.**

Figueroa claims that his presentence investigation report ("PSI") contained several factual inaccuracies and that reliance by this court on these inaccuracies resulted in imposition of an unjustly harsh sentence. Figueroa's motion is denied as it is untimely. Rule 32 (b)(6)(B) of the Federal Rules of Criminal Procedure permits a defendant to file objections to his PSI report within 14 days after receipt of such report. Figueroa received his presentence report in late September of 1993, therefore his current attempt to file objections is extremely late. Furthermore, the record reveals that this is Figueroa's second challenge. In October 1993 Figueroa, through his retained counsel, William Rapp, filed objections to his PSI report which were considered by this court prior to sentencing. Finally, Figueroa's request for nunc pro tunc status is not redeeming. Figueroa offers no explanation for his more than four year delay. Accordingly, Figueroa's motion to correct his PSI report is denied.<sup>1</sup>

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1. In his objections to the government's answer Figueroa also argues that he never received the Addendum to his PSI and therefore was not able to object to the contents of such Addendum. The Addendum in question, however, contains the preparing probation officer's certification that the contents of the  
(continued...)

## **II. Motion To Correct Illegal Sentence.**

Figueroa claims that the length of his sentence is illegal and requests relief pursuant to Rules 32 and 35 of the Federal Rules of Criminal Procedure.

The circumstances under which Rule 35 works to correct a sentence are not present here. The appeals court has not requested correction on remand, 35(a), the government has not made a motion demonstrating changed circumstances, 35(b), and there is no evidence that Figueroa's sentence was a result of arithmetic, technical or clear error, 35(c).

As to Rule 32 Figueroa simply states "Sentence was imposed on erroneous facts presented to the court by the Prosecutor and Probation Department and in violation of Rule 32 which exposed Figueroa to a harsher punishment in violation of his Constitutional Rights." Rule 32 provides, in part for a sentencing hearing at which time defendants can present objections to their PSI report to the court. Thus, through his motion Figueroa appears to be testing the adequacy of such a proceeding in his case. Review of Figueroa's sentencing transcript, however, demonstrates that all of Figueroa's PSI objections were fully presented by his attorney and were given

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1. (...continued)

Addendum were communicated to defendant's counsel. Furthermore, it is difficult to detect what significant objections Figueroa could possibly make to the two paragraph Addendum. The Addendum simply states that the probation office maintains its initial recommendation after reviewing Figueroa's October 1993 objections.

careful consideration by this court prior to sentencing. Therefore, as neither Rule 35 nor Rule 32 apply to his claims Figueroa's motion to correct his sentence is denied.

**III. Motion to Vacate, Set Aside of Correct Sentence  
Pursuant to 28 U.S.C. § 2255.**

In January 1995, Figueroa filed a pro se habeas petition claiming that he was denied effective assistance of counsel at trial, sentencing and on appeal.<sup>2</sup> On November 16, 1995 Magistrate Angell appointed counsel to aid Figueroa in the presentation of his habeas claims. An evidentiary hearing was held on May 23, 1996. Based on Figueroa's motion, the government's response and the issues, arguments and evidence presented at Figueroa's evidentiary hearing, Magistrate Angell concluded that Figueroa's claims of ineffective assistance lacked merit and filed a proposed findings of fact and a report recommending that Figueroa's request for habeas relief be denied (Docket No. 450). Presently, before the court are Figueroa's objections to Magistrate Angell's recommendation. Figueroa filed one set of objections on January 13, 1997 and through his court appointed counsel filed a second set of supplemental objections on November 3, 1997.

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2. Figueroa presents approximately eight different claims of ineffectiveness against different attorneys who represented him at various stages of his criminal trial. A detailed explanation of these claims and a description of Figueroa's history of multiple representatives is provided in Magistrate Angell's Report and Recommendation.

As to the adequacy of his trial counsel, Joshua Briskin, Figueroa essentially challenges Magistrate Angell's credibility determinations. Figueroa argues that transcripts from the evidentiary hearing demonstrate Magistrate Angell's factual findings and legal conclusions were 'clearly erroneous' and therefore should not be sustained by this court.

Based on her observations of Briskin during the evidentiary hearing, Magistrate Angell found Briskin's testimony credible and concluded that his conduct during Figueroa's trial did not amount to ineffective assistance. A district court may not reject a magistrates' finding of fact, without an evidentiary hearing, where the finding is based on the credibility of a witness testifying before the magistrate judge. Hill v. Beyer, 62 F.3d 474, 482 (3d Cir. 1995). Therefore, I defer to Magistrate Angell's determination that Briskin's testimony was credible. Furthermore, based on my independent review of the relevant law, I also agree with Magistrate Angell's legal conclusions regarding Briskin's performance. Though, not stellar, Briskin's performance was neither inadequate nor prejudicial as required by Strickland. See Strickland v. Washington, 466 U.S. 668 (1984). He conducted investigations in preparation for trial; discussed important matters with his client such as whether or not Figueroa should testify on his own behalf or enter into a plea bargain; considered and rejected the

possibility of calling alibi witnesses and presented relevant defenses and jury instructions.

Next Figueroa attacks Briskin's appointment. On November 9, 1992, Briskin was appointed to represent Figueroa. Two days later Attorney Luis Oscar Beltre entered his appearance on behalf of Figueroa. The government filed a motion asking for Beltre's disqualification. In January 1993 Beltre requested withdrawal as counsel as he had been arrested on federal money laundering charges in New York and further requested that this court appoint new counsel for Figueroa. Beltre's request was granted and Briskin was reappointed as Figueroa's counsel. Figueroa argues that rather than reappointing Briskin he should have been afforded an opportunity to retain counsel of his choice.

The right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, however, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers. See Morris v. Slappy, 461 U.S. 1, 13-14 (1983). Thus, while a defendant's choice may not be arbitrarily denied, a defendant's right to choose his own counsel must be balanced against the fair and proper administration of justice. U.S. v. Rankin, 779 F.2d 956, 960 (3d Cir. 1986). The Sixth

Amendment right to choose one's own counsel is circumscribed in several important respects. Wheat v. U.S., 486 U.S. 153, 160 (1988). A defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant. Id. The record reveals that Figueroa did attempt to obtain counsel of his choice, Lynne F. Stewart, but, because such counsel refused to enter an appearance his attempts were in vain. Thus, under the circumstances, this court's reappointment of Briskin did not violate Figueroa's rights under the Sixth Amendment.

Finally, Figueroa challenges the adequacy of his retained counsel during sentencing and appeal. I agree with Magistrate Angell's finding that in both phases Figueroa's attorney, William Rapp, provided effective assistance. Review of the sentencing transcripts reveals that Rapp raised several relevant arguments at sentencing -- specifically, he challenged the credibility of prosecution witnesses' testimony concerning the total amount of drugs involved in the conspiracy. Likewise review of the appellate brief Rapp submitted on behalf of Figueroa demonstrates that Rapp effectively raised and argued four relevant issues on appeal. That his appeal was ultimately unsuccessful does not diminish the adequacy of Rapp's appellate performance. Accordingly, I find that Figueroa's trial, sentencing and appellate counsel were effective, and therefore

adopt Magistrate Angell's recommendation that Figueroa's habeas petition be denied.

An appropriate order follows.



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JUAN FIGUEROA	:	92-540-03

O R D E R

AND NOW, this 5th day of February, 1998:

(1) upon consideration of Defendant's pro se motion to correct his presentence report nunc pro tunc (Docket No. 479); Defendant's pro se motion to correct illegal sentence (Docket No. 480); the government's combined answer (Docket No. 484); and Defendant's objections to the government's answer (Docket No. 490); it is hereby ordered that Defendant's motions are **DENIED**; and

(2) upon consideration of Defendant's objections to Magistrate Judge Faith Angell's report recommending denial of Defendant's previously filed petition for habeas relief (Docket Nos. 455 and 489), it is hereby ordered that Magistrate Judge Faith Angell's report and recommendation (Docket No. 450) is **APPROVED** and **ADOPTED**. Accordingly, Defendant's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 (Docket No. 387) is **DENIED**.

Because defendant has not made a substantial showing of the denial of any constitutional right for the reasons set forth in this memorandum, no certificate of appealability will be issued.

BY THE COURT:

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RONALD L. BUCKWALTER, J.